BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-1925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioner,

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL,
MERIT SYSTEMS PROTECTION BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY MEMORANDUM FOR THE PETITIONERS

MARK D. ROTH
General Counsel

MITCHELL J. NOTIS
Deputy General Counsel

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700 Ext. 311

LOIS G. WILLIAMS *
Director of Litigation

GREGORY O'DUDEN
Assistant Director of Litigation

NATIONAL TREASURY EMPLOYEES
UNION
1730 K Street, N.W. Suite 1101
Washington, D.C. 20006
(202) 785-4411

Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases:	Page
Babbit v. *United Farm Workers*, 442 U.S. 289 (1979)	3, 4
Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963)	5, 6
Joseph v. *United States Civil Service Commission*, 554 F.2d 1140, 1150 n.17 (D.C. Cir. 1977)	5
United States Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548 (1973)	4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1925

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioner,

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL,
MERIT SYSTEMS PROTECTION BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY MEMORANDUM FOR THE PETITIONERS

We have shown how the divided court of appeals below deviated from numerous decisions of this Court when it decided that the unions' challenge to the constitutionality of an advisory opinion issued by the Special Counsel did not present a controversy ripe for judicial review. The government's opposition to the unions' petition fails to offer any convincing reasons why this Court should not review the court of appeals' decision. In seeking to diminish the importance of this case, the government conspicuously ignores that, as a result of the appeals court's ruling, federal workers across the nation are now effectively barred from exercising their First Amendment right to participate in neutrally conducted voter registra-

tion drives sponsored by NTEU or AFGE or any other union which endorses candidates for office.[1]

1. Attempting to deflect the unions' central argument that the Special Counsel's advisory opinion was ripe for review because it carried a serious threat of enforcement, the government merely amplifies on the appeals court's limited and erroneous treatment of the issue. In so doing, the government miscasts the relevant inquiry for determining whether the Special Counsel's action was justiciable.

As we have noted, the court of appeals misread the teachings of this Court when it indicated that only a direct, explicit threat of Hatch Act prosecution would create a justiciable controversy (Pet. 8; App., *infra*, 18a).[2] The government simply echoes this faulty view when it observes that the Special Counsel's opinion "did not by its terms indicate any intention on the part of the

---

[1] The government asserts that the Special Counsel's action has "little continuing significance" because his advisory opinion arose in the context of the 1984 election year (Opposition at 17). It is clear, however, that the Special Counsel's critical conclusion (that neutrally conducted registration drives are "partisan" when the sponsoring union has endorsed candidates for office) stated a principle of general applicability which in no way expired with the 1984 elections. As the dissent below observed, the Special Counsel's interpretation of the Hatch Act "remain[s] the law" (Pet. App. 23a). The unions could hardly reasonably advise their members to ignore it.

[2] Thus, contrary to the government's claim, this case involves fundamental legal error and not merely the resolution of a factual question. Indeed, the court of appeals clearly viewed the issue as a legal one. In rejecting the district court's determination that the Special Counsel's opinion was tantamount to a threat of enforcement, the court of appeals merely substituted its judgment for that of the district court. To the extent the threat of enforcement issue is a question of fact, the court of appeals would have been obliged to rule the district court's finding clearly erroneous—a determination the appeals court, of course, did not make.

Special Counsel to prosecute petitioner." (Opposition at 6).[3]

Such a stringent characterization of the justiciability test set by this Court's "threat of enforcement" decisions is completely unwarranted. For example, *Babbitt* v. *United Farm Workers*, 442 U.S. 289 (1979) made clear that showing a definite intention to prosecute is not a prerequisite of justiciability. The decision makes plain that, in assessing whether a "credible threat of prosecution" exists, the salient question is whether there is a reasonable fear of enforcement. In finding justiciable the plaintiff-union's reasonable fear of prosecution, the Court in *Babbitt* was especially influenced by the fact that the state had "not disavowed any intention of invoking" criminal penalties. 442 U.S. at 302.

When the test of justiciability is thus correctly stated in terms of the reasonableness of the fear of prosecution, it is evident that the Special Counsel's action is subject to review. Here, the fear of prosecution was graphically demonstrated when the unions' federal employee members aborted all of their registration activities upon issuance of the Special Counsel's opinion.[4] The reasonableness of

---

[3] Contrary to the government's suggestion, the Special Counsel's listing of various factors that may be considered in deciding whether a registration drive was partisan in no way undercuts the ripeness of the controversy presented by the unions. As the dissent below accurately observed, it does not matter how many factors "might be relevant in some situations" because here the Special Counsel's "evaluation of the drives sponsored by AFGE and NTEU was anything but tentative . . ." (Pet. App. 24a).

Regarding the government's assertions about the infrequency of actual Hatch Act prosecutions, see the union's Petition at 13-15.

[4] In arguing that the Special Counsel's opinion presented no credible threat of enforcement, the government appears to have seriously misapprehended the facts in this case. The government erroneously claims that the unions' members continued to engage in registration activities even after the Special Counsel responded to the unions' inquiry; the government then suggests that the

that fear, as we have explained, can hardly be doubted (see Pet. 10-11). Here, those employees had in hand a letter from the prosecutor of Hatch Act violations, categorically declaring that their participation in the unions' planned registration drives would be illegal. To suggest that, in the face of the Special Counsel's letter, the employees' termination of their registration activities was somehow unreasonable or animated by an unrealistic fear defies common sense, especially when one considers that disregard of the Special Counsel's advice posed a threat to their livelihoods. To reiterate the district court's observation, the Special Counsel gave the unions and their members "no reason to think" that if they proceeded with their planned drives, he would "change his mind about them or not do his duty . . ." as prosecutor of Hatch Act violations (App., *infra*, 46a). Indeed, the situation here is strikingly similar to that found justiciable in *Babbitt*, given the fact that the Special Counsel plainly never "disavowed any intention" of prosecuting the unions' members if they ignored his unmistakable advice. 442 U.S. at 302.

2. The government's effort to distinguish the principal cases, upon which the unions rely, is unavailing. The government claims that *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) is inapposite for three reasons. First, the government asserts that the plaintiffs there were more specific than the unions here in describing the activities in which they wished to engage. This claim is plainly unconvincing in light of the descriptions of planned

---

absence of prosecution for *those* activities shows that employees had no reason to fear Hatch Act enforcement proceedings (Opposition at 6, n. 3). The undisputed facts show, however, that in the wake of the Special Counsel's advice, the unions' members aborted all of their planned registration activities (Pet. 10-11; see *e.g.*, NTEU J.A. 49-53, 63). Thus, it is clear that a principal element of the government's argument is based on a mistaken factual premise.

registration activities found in affidavits submitted by the unions to the district court which were considered by the Special Counsel (Pet. 11-12).

Second, the government states that, unlike the unions here, the plaintiffs in *Letter Carriers* "alleged actual enforcement of the Hatch Act against them." (Opposition at 10-11, n.8). A close reading of *Letter Carriers* shows this characterization to be misleading. In *Letter Carriers*, the Court observed that the plaintiffs had alleged that the then-existing Civil Service Commission "was enforcing *or threatening to enforce* . . ." the Hatch Act against them. 413 U.S. at 551 (emphasis added). The Court then set out in a footnote the Letter Carriers' statement as to the activities in which the six individual plaintiffs desired to participate. 413 U.S. at 551-552, n.3. That statement reveals that none of the individuals was actually "the subject of a Civil Service Commission enforcement action." *Joseph* v. *United States Civil Service Commission*, 554 F.2d 1140, 1150, n.17 (D.C. Cir. 1977). In short, the government's suggestion that *Letter Carriers*' justiciability turned on the allegations of actual Hatch Act enforcement is unfounded. The Court made no distinction between the allegations of threatened or actual enforcement. Moreover, the facts there plainly revealed that no actual enforcement was even underway.

Third, the government maintains that *Letter Carriers* is distinguishable because it was decided before the enactment of the Civil Service Reform Act (CSRA), which created the Merit Systems Protection Board and the Special Counsel. That fact is, however, entirely irrelevant to the justiciability question posed here. As we explained in our petition, a determination that this case is ripe for review is in no way inconsistent with the scheme of the CSRA (Pet. 17-20).

Finally, the government unpersuasively tries to rebut the unions' reliance on *Bantam Books, Inc.* v. *Sullivan*,

372 U.S. 58 (1963) on the grounds that the state agency there was, unlike the Special Counsel, not merely giving legal advice but actually functioning as a regulatory body. Of course, this distinction only begs the question. As we have shown (Pet. 18-19), the whole point of our discussion of *Bantam Books* was to illustrate that, like the state agency there, the Special Counsel's issuance operated as more than mere advice; because of his status as the prosecutor of Hatch Act violations, his opinion served to stifle First Amendment activity and thus effectively functioned as an instrument of regulation.

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

MARK D. ROTH
General Counsel

MITCHELL J. NOTIS
Deputy General Counsel

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700 Ext. 311

LOIS G. WILLIAMS *
Director of Litigation

GREGORY O'DUDEN
Assistant Director of Litigation

NATIONAL TREASURY EMPLOYEES UNION
1730 K Street, N.W. Suite 1101
Washington, D.C. 20006
(202) 785-4411

Counsel for Petitioners

* Counsel of Record

September 1985